



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:

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ISCR Case No. 15-02303

Applicant for Security Clearance

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: *Pro se*

08/19/2016

Decision

LYNCH, Noreen, A., Administrative Judge:

The Department of Defense (DOD) issued a Statement of Reasons (SOR) alleging security concerns arising under Guideline E (Personal Conduct). The SOR was dated September 24, 2015. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AG) implemented in September 2006.

Applicant timely answered the SOR and elected to have his case decided on the record in lieu of a hearing. Department Counsel submitted the Government's written case on December 14, 2015. Applicant received a complete file of relevant material (FORM) on December 30, 2015, and was provided an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's case. Applicant submitted a response, which was marked as AX A and entered into the record without objection. The case was assigned to me on August 12, 2016. Based on a review of the case file, eligibility for access to classified information is denied.

Findings of Fact

In his answer to the SOR, Applicant admitted the factual allegation under Guideline E (Personal Conduct), and provided explanations.

Applicant is a 41-year-old employee of a defense contractor. He received his undergraduate degree in 1996. (Item 3) He also attended courses from 2010 until 2013, but he did not obtain a degree. He is single. Applicant has worked for his current employer since April 2011. He has held a security clearance since 2003. (Item 2) In approximately 2009, he was granted a top secret clearance. (Item 4)

Personal Conduct

Applicant admitted that he used marijuana in April 2013. He also disclosed on his security clearance questionnaire that he first used marijuana at a party with friends in 2008. He noted that he used marijuana twice for experimental purposes. In his answer to the SOR, he stated that this was a mistake on his part and a lapse of judgement that he regrets. He stated that he takes responsibility for the mistake and that it is one that he will not repeat.

Applicant explained in his 2014 investigative interview that the marijuana was provided at a party and that he was trying to impress a girl that he was dating. He noted that he inhaled and took approximately three puffs from a rolled cigarette. (Item 3) He later described that at his residence in 2013, he used a vaporizer (water pipe) with his roommate's boyfriend because he was trying to have fun socially. He noted that the drug did not have any effect on him and that he did not intend to use drugs in the future. During the 2014 interview he emphasized that he never purchased marijuana. He noted that he has never been diagnosed for treatment and the use did not cause him any financial or legal problems. He has never been involved with using any other substance. He was aware that his marijuana use occurred after he was granted a security clearance. (Item 3)

Applicant points to his many years working as a contractor. He asks that his hard work be taken into consideration. In a response to FORM, dated February 1, 2016, Applicant states that he owns his own home and has tenants in the home to offset expenses. He notes that the tenants will be moving out and he will no longer associate with them or their significant others.

Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible

rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." ¹ The burden of proof is something less than a preponderance of evidence. ² The ultimate burden of persuasion is on the applicant. ³

A person seeking access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." ⁴ "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." ⁵ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be

¹ See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

² *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

³ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁴ See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

⁵ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

resolved in favor of protecting such information.⁶ The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant's character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

Analysis

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the

⁶ *Id.*

person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources.

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group;

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment; and

(g) association with persons involved in criminal activity.

Applicant's use of marijuana occurred in 2008 and 2013. He was working for a number of years and had held a security clearance initially since 2003. He was eligible for a top secret clearance in 2009. He was not a teenager at the time. He stated that he used it to impress a date and later to have fun socially. In his response to FORM, it appears that he had renters who were using marijuana with their significant others as late as February 2016. He stated that he regrets his mistake and does not intend any future use of an illegal substance. His conduct shows lack of judgment, reliability and trustworthiness over a period of years. AG ¶¶ 16(d) and (e). His conduct shows a pattern of poor judgment. He did disclose his use of marijuana on his security clearance application to his credit. However, absent any significant evidence of mitigation, he has not met his burden.

AG ¶ 17 provides conditions that could mitigate security concerns:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant admitted his latest 2013 marijuana use on his security clearance application. He has not presented any other information to persuade me that he has mitigated personal conduct concerns. I have doubts about his judgment and reliability. After considering the mitigating conditions outlined in AG ¶ 17, I conclude Applicant has not mitigated the security concern under personal conduct.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation

for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the whole-person factors. Applicant is a mature man who has worked for many years as a contractor. According to his security clearance application, he first obtained a clearance in 2003. He was eligible for a top secret in 2009. During those years, he used marijuana twice for no good reason. The choices he made over the years indicate lack of judgement.

Applicant has not provided any information to show that he is a changed person. At this point, I have doubts about his judgment and reliability. Any doubts must be resolved in favor of the Government. Applicant has not met his burden in this case. He has not mitigated the security concerns under personal conduct. Clearance is denied.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline E:	AGAINST APPLICANT
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Subparagraph 1.a:	Against Applicant
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Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant a security clearance. Clearance is denied.

NOREEN A. LYNCH.
Administrative Judge